CONSTITUTIONAL QUESTIONS INVOLVED IN THE COMMODITY CLAUSE OF THE HEPBURN ACT.

THE Act of Congress approved June 26th, 1906, amending the Interstate Commerce Act of February 4th, 1887, provides:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

Three distinct classes of questions may arise under this provision. First: Has Congress power to pass such an Act? Second: What amounts to a violation of the Act? Third: What are the consequences to the carrier violating the Act, and the means given to the executive to enforce it? This article deals only with questions falling under the first class. There may be constitutional questions arising out of the penalties, if any, prescribed by Congress for a violation of the clause, or constitutional objections to the means given to the executive to enforce the Act. If there are such constitutional questions they are beyond the scope of this article, which deals only with the constitutional questions suggested by the section which has been recited.

The third paragraph of the eighth section of the first article of our federal Constitution gives to Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Is a law which prohibits an interstate carrier from carrying a product in which the carrier is directly or indirectly interested constitutional? The leading case on the Commerce Clause is Gibbons *v.* Ogden, decided in 1824.[1] In that case, under the guidance of Chief Justice Marshall, the Supreme Court

[1] 9 Wheat. (U. S.) 1.

held that a common carrier engaged in transporting goods or passengers between two or more states was engaged in interstate commerce. The soundness of this conclusion has never been doubted by any subsequent member of the court. A difference of opinion, however, has always existed in regard to the correct meaning of the word "commerce." Without violating the habits of English speech, the phrase "commerce among the states" may be understood as including every form of lawful intercourse between the peoples of the states. Again, it may be regarded as including only every form of intercourse for business purposes. Lastly, it may be interpreted as including the buying and selling of commodities, but nothing more. The case of Gibbons *v.* Ogden put at rest, apparently forever, the idea that the framers of the Constitution intended to confine the meaning of the word "commerce" to the third and most restricted sense in which the word is employed in common speech.[2] Since that decision the differences among the members of the Supreme Court have been confined to the other possible meanings of the word.

In view of the differences still existing among the members of the Supreme Court as to whether the first or the second view of the word "commerce" is the one intended by the framers of the Constitution, it is possible that under some circumstances even the act of transporting goods from one state to another might not be regarded by all the members of the court as interstate commerce.[3] The act of transporting goods between the states may be undertaken in different ways and with different objects. The transportation may be by a common carrier. Here the contract of carriage for hire is a business contract, whether the shipper intends to use the goods himself on their arrival at their destination, or whether he intends to sell them. The act of carrying out this contract is interstate commerce. This was what was decided in Gibbons *v.* Ogden. But the owner of goods desiring to ship them to another state is not obliged to employ the services of a common carrier. He may himself transport them in his own wagon, intending either to use them himself on arriving at his destination, or to sell them.

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[2] The writer has discussed the possible meanings of the word "commerce" and the decision in Gibbons *v.* Ogden in his essay on Marshall. See 2 Great Am. Lawyers, 369 *et seq.*

[3] For a full statement of the conception that "commerce among the states" means only commercial intercourse, see the dissenting opinion of Chief Justice Fuller in the Lottery Case, 188 U. S. 321, 366.

Where the goods are transported in the wagon of the owner for the purpose of sale after their arrival in the other state, whether we adopt the narrowest view now possible of the meaning of the word "commerce" or not, the act of transporting is interstate commerce. It is part of the business intercourse between the states. The only case on which there can be any doubt is the case where A, owning goods in one state, for the purpose of his own use of these goods in another state, transports the goods to that other state in his own wagon. The Supreme Court has decided that goods transported from one state are subjects of interstate commerce until sold, or otherwise incorporated into the mass of property in the state of importation.[4] The almost inevitable inference from this decision is that both the method and object of transportation are immaterial. If both the method and object of transportation are immaterial, even in our third case, the man who, changing his home, carries his household goods from one state to another, while engaged in their transportation, is engaged in interstate commerce. For our present purposes, however, a determination of this "neat point" is unimportant. The Act of Congress under discussion expressly allows the carrier to transport "such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier." In effect, the Act prohibits only transportation, for the purpose of sale, of goods owned directly or indirectly by the carrier. Therefore, even though we adopt the narrowest possible construction of the word "commerce," in view of the universally admitted soundness of the decision in Gibbons *v.* Ogden, the Commodity Clause directly affects commerce among the states.

The Constitution, however, does not read "Congress shall have power to prohibit in whole or in part interstate commerce." The power which is given to Congress is a power to "regulate." There has been and is considerable difference of opinion in respect to the extent of the power thus conferred. Three views are possible. The first is that the power given in the first article is an absolute power; that standing alone the article vests in Congress a power over interstate commerce as absolute as the power of one of the thirteen states over its foreign commerce prior to the adoption of the Constitution; that the power necessarily includes a power to license and a power to destroy. This view of course admits that

[4] Brown *v.* Maryland, 12 Wheat. (U. S.) 419.

Congress is limited in the means which it may adopt to execute the power, but claims these limitations are not found in the first article, but in other parts of the Constitution, as in the first amendments.

The second view is that, while the power, being a power given to a sovereign government created for the very purpose of exercising the power, must be regarded as absolute, where not expressly limited, the power to regulate is from the very nature of the word itself a power which falls short, on the one hand, of the power to destroy, and, on the other, of the power to conduct. Under this view the federal government, without an amendment to the Constitution, could not arbitrarily prohibit interstate or foreign commerce in a recognized article of commerce, nor could it, without an amendment, operate the railroads of the country.

The third view is that, while the power given to Congress to regulate commerce may, on its face, be fairly construed to include both the power to conduct and the power to destroy, the power, like all other powers conferred in the Constitution on the federal government, is limited, not merely by the express limitations contained in the first amendments to the Constitution, but by "the nature of our federal state." One who adopts this last view will probably sanction the federal ownership and operation of the railroads; but would deny the right of the federal government to destroy interstate commerce in a recognized article of commerce, unless, perhaps, such destruction was fairly calculated to increase and benefit interstate commerce in other branches of trade, or protect the morals, health, or safety of the people.[5]

It cannot be said that the Supreme Court has ever definitely adopted any one of these three possible views. As a result no question, not decided, involving the meaning of the word "regulate" is free from doubt, unless the proposed regulation is clearly within all three possible views of the meaning of the word. The Commodity Clause meets this requirement. Irrespective of which of the three possible views of the meaning of the word "regulate" and the extent of the power conferred on Congress finds most support in the decisions of the Supreme Court, under any view Congress has in the first article power to pass a law which pre-

[5] The writer has discussed the value of the conception that there exist limitations on federal power arising from the nature of our federal state, in an article on "Can the United States by Treaty Confer on Japanese Residents in California the Right to Attend the Public Schools?" 55 Am. L. Reg. (N. S.) (now U. P. L. Rev.) 73.

vents a common carrier engaged in interstate commerce from carrying between the states commodities in which it is directly or indirectly interested.[6] Under the view that Congress under the

[6] A passage from the opinion of Chief Justice Marshall in Gibbons *v.* Ogden may be quoted in support of the first view; he says: "We are now arrived at the inquiry, What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." 9 Wheat. (U. S.) 196.

This assertion by the great Chief Justice has been often repeated. It has only recently been made the basis for the opinions of Mr. Justice White and of Mr. Justice Moody in Employers' Liability Cases (Howard *v.* Illinois Central R. R. Co.), 207 U. S. 463. And yet, though the spirit of the quoted passage from Marshall's opinion unquestionably tends toward the first view, it will be noticed that he did not say that the power to regulate was the power to destroy. He merely forcibly pointed out that under this article Congress has the absolute untrammeled choice of the means of regulation which it chooses to adopt. This untrammeled choice of the means of regulation does not necessarily involve the conception that absolute prohibition is regulation. For instance, Mr. Justice Harlan, in giving the opinion of the court in the Lottery Case, 188 U. S. 321, 356, which upheld the power of Congress to prohibit persons in one state sending lottery tickets into another state, said: "In this connection it must not be forgotten that the power of Congress to regulate commerce among the states is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution." But even the learned Justice just quoted is at pains to point out, later in the same opinion, that it will be time enough to consider the full extent of the power of prohibition possessed by Congress when Congress arbitrarily excludes from commerce among the states a useful article of commerce. P. 362.

The power to regulate interstate commerce for the promotion of such commerce has never been questioned; and it has been decided that where the act as a whole was fairly designed to protect or promote commerce a particular regulation, though it takes the form of a prohibition, is within the power of Congress. Thus the constitutionality of an Act of Congress prohibiting interstate railways from carrying cattle infected with a contagious disease has been assumed, Reid *v.* Colorado, 187 U. S. 137 (1902), and the Sherman Anti-Trust Act, prohibiting all contracts designed to restrain interstate commerce, has been repeatedly sustained. United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290 (1896); United States *v.* Joint Traffic Ass'n, 171 U. S. 505 (1898); Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211 (1899); Northern Securities Co. *v.* United States, 193 U. S. 197 (1904). The Supreme Court, though by divided vote, has gone further and upheld an act of Congress which, not for the benefit of interstate commerce, but for the benefit of the morals of the people of the United States, prohibited persons in one state sending lottery tickets to another state: Lottery Case, 188 U. S. 321 (1903). See also *In re* Rahrer, 140 U. S. 545 (1891). The act upheld in this last case was one passed to permit the states to prohibit the sale, by the importer, of liquor imported from another state, though the liquor was sold in the package in which it had been imported. The act was the result of the decision of the Supreme Court in Leisy *v.* Hardin, 135 U. S. 100 (1889), in which the court held

first article has absolute power to encourage or to destroy interstate commerce, the fact that the Act is within the power is manifest. The two other views merely limit the power conferred by requiring that the regulation shall stop short of arbitrary prohibition. Under any view, therefore, a law which is passed for the purpose of regulating interstate commerce — which does regulate and does not destroy — is within the power. The Act under discussion does not prohibit interstate commerce in any particular commodity or commodities. It applies only to the transportation of commodities. Here again, it does not prohibit the transportation between the states of any commodities, not even of commodities owned by the common carrier. The Act merely prohibits the transportation by the carrier of commodities in which it has an interest direct or indirect. In those cases in which the commodities have been manufactured, mined, or produced by a common carrier, or under its authority, the Act goes somewhat further and prohibits their transportation by the carrier, manufacturing, mining, or producing them, even though at the time of transportation it has no longer any interest in them. This is not a regulation of commodities, it is a regulation of the transportation of commodities by a common carrier. As it has been decided that the act of carrying goods for hire between two states is interstate commerce, any regulation of an interstate carrier which bears a reasonable relation to its duties as a common carrier of commodities between the states is a regulation of interstate commerce. The duties of a common carrier which has announced that it will carry commodities are to carry as safely and expeditiously as possible all commodities given it to carry by members of the public; charge reasonable rates of carriage; and treat all persons alike. That the ownership by a common carrier of some of the commodities it

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that in the absence of any congressional legislation it was to be presumed that Congress desired interstate commerce in liquor to be free from state interference. The act upheld in the Rahrer case was merely an act declaring that Congress was willing that the states acting under the police power should prohibit the first sale. It may be questioned whether this case may be regarded as a regulation of interstate commerce in a recognized article of commerce for the purpose of promoting the morals of the people of the United States. For such use of the case see Mr. Justice Harlan's opinion in the Lottery Case, 188 U. S. 321, 358. Of course, if the power to regulate commerce extends to a power to prohibit any commodity from entering interstate commerce, then Congress may prohibit interstate commerce in liquor. For a government, having a power to legislate *in re* a particular subject, does not lose that power because the real motive behind the legislation is the accomplishment of a purpose on which no direct power of legislation exists.

carries is a condition tending to prevent the performance of the last two of these duties, and also perhaps to some extent the first, is a matter of common knowledge to those at all familiar with the history of our coal industry. It may be true that the evils tending to result from this condition not only vary in intensity with changes in industrial conditions, but that the evils themselves may be checked by other means than that adopted in this last enactment of Congress. Congress, however, is not limited in its choice of means except by the express prohibitions contained in the Constitution. If the end be within an express power, it is sufficient that the means adopted by Congress to accomplish the end bear a reasonable relation to that end. We may, therefore, fairly conclude that Congress under the power to regulate commerce among the states has the power to pass an act prohibiting interstate common carriers from carrying between the states for the purpose of sale commodities in which they are directly or indirectly interested.

But though the Act in question may be within the power granted to Congress in the first article of the Constitution, it is admitted by all that in regulating interstate commerce Congress cannot adopt a means prohibited by any of the first amendments. The means selected by Congress must not only be "legitimate," in the sense that it must be within the scope of a power expressly granted; it is also necessary that it should not transgress the rules expressly incorporated into the Constitution to protect the individual from the arbitrary exercise by the federal government of the powers granted to it in the first or in any other article of the Constitution.

The only amendment which would appear to have any bearing on the Commodity Clause is the Fifth Amendment, which provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

In this Amendment we have two rules designed to protect property: one relates to the taking of property without just compensation; the other to the deprivation of property without due

process of law. Does the Act under discussion as applied to any possible combination of circumstances which may arise under it, violate either of these provisions? The last clause of the Amendment is a general prohibition evidently binding on all branches of the federal government. Congress is prohibited from passing any law which takes property for public use without compensation. The words "for public use" are not words which limit the words "nor shall private property be taken." Property, even for a public use, cannot be taken without just compensation. *A fortiori* it cannot be taken without just compensation for a private use. Whether it can be taken for a private use even with compensation need not be discussed. At the time of the passage of the Act there were many railroad companies in the country which directly or indirectly owned coal lands and coal. It may be that there are other railroads which have acquired an interest direct or indirect in coal properties since the passage of the Act. Again, there may be companies who now wish to acquire coal properties and hereafter carry to market the coal mined from the properties they acquire. It is evident that the Act as applied to any of these three possible classes of companies does not take that part of their property which is now invested in their business as common carriers. We will consider later whether the Act as applied to a company owning a direct or indirect interest in coal lands may or may not be considered as taking from such company their coal property? But as far as the railroad property of the carrier is concerned, it is evident that, as applied to any possible combination of circumstances, the Act does not violate the last prohibition contained in the Fifth Amendment. If we look at the Act, therefore, from the point of view of its effect on the railroad property of the common carrier, the only question which arises under the Fifth Amendment is: Does the Act violate that clause of the Amendment which prevents the deprivation of property without "due process of law"?

The answer to this last question involves a consideration of one of the most intricate subjects in our constitutional law: Can a prohibition of a particular use or uses of property ever amount to a deprivation of property without due process? If a deprivation of use may under some, but not all, circumstances amount to a deprivation of property without due process, what are the circumstances under which it does amount to such a deprivation?

Before directly addressing ourselves to this question it is neces-

sary to dispose of certain preliminary matters. In the first place, was that part of the Fifth Amendment which provides that "no person shall be . . . deprived of . . . property, without due process of law," designed to protect the individual from arbitrary action by Congress, or was it merely designed to protect the individual from arbitrary judicial or executive action? If it was not designed to limit legislative power, its consideration in connection with the constitutionality of any act of Congress would be unnecessary. So also, as we have decided that the Act is within the power conferred by the first article, it would be unnecessary to consider the provision, if, though limiting the power of Congress, it was not designed to impose any special limitations on Congress, but merely to emphasize the fact that Congress could pass no law not authorized by some expressed grant of power contained in the Constitution. If the question were new, an examination of English history and of the text of the Amendment as a whole might well lead us to conclude that the prohibition in question was designed to protect the individual only from arbitrary and illegal oppression by the executive or judicial branches of the federal government. The clause in which the words "due process of law" appear is undoubtedly derived from the Thirty-Ninth Article of Magna Charta:

> "No free man shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land."

The terms "due process of law" and "laws of the land" would appear to be practically synonymous. That the Barons at Runnymede intended to force the King to act in proceeding against an individual under and not above the law, is clear; that they did not intend to curtail their own power to consent to a change in the law, is equally clear.

The framers of the Amendment evidently intended, by the use of the words "due process of law," to express the principle that their federal government was a government of laws, not a government of men. That they intended to do more than this is, to say the least, exceedingly doubtful, in view of the evident origin of the clause, its connection in the context with legal proceedings, and the fact that in the last part of the eighteenth century men were possessed by a dread of executive and judicial, rather than

legislative, oppression. However, this is a question which is no longer open for legal discussion. As long ago as 1856, Judge Curtis, speaking for the Supreme Court in the case of Murray's Lessee *v.* Hoboken Land Improvement Company, took the position that the restraint contained in this part of the Fifth Amendment is a restraint on "the legislative as well as the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will."[7] And in answer to his own question: "To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process?" he says:

"To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the immigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

It will be seen that Judge Curtis was not content to read the clause as prohibiting Congress from making a law contrary to the Constitution, or beyond the scope of the powers granted. He regarded the clause itself as incorporating into the Constitution, as additional restraints on legislative power, those fundamental principles which the history of England proves necessary to the preservation of individual liberty and private property. It is true that many of these principles, if not all, were incorporated separately in our federal Bill of Rights. But, if any were left out, the view stated by Judge Curtis is, that this clause, in requiring due process of law, gathers them in and adds them to the other restraints on the arbitrary exercise of power detailed in the rest of the Fifth Amendment and the other amendments to the Constitution.

The position taken toward the clause prohibiting the deprivation of property without due process by Judge Curtis, as a clause embodying important, if indefinite, restraints on legislative power, was not original with him. It had already been taken by several state judges and appears to have been the universally accepted meaning of the clause at the time of the decision of the case. Furthermore, since his decision, the views which he expressed

[7] 18 How. (U. S.) 272, 276, 277.

have remained the views of the legal profession. They have been acted on again and again, not only by the Supreme Court, but by the courts of last resort of those states which have in their constitutions a similar provision.[8] The fact that the clause in regard to due process of law is a restraint on legislative power, and the fact that the clause contains independent restraints on legislative power which may not be found in other parts of the Constitution, may now be considered settled legal propositions. Therefore it cannot be said that the Commodity Clause of the Hepburn Act is "due process" merely because it was regularly passed by Congress, is within the scope of its expressed powers, and is not contrary to any other provision of the Constitution.

There is another preliminary matter. The words "due process of law" might be taken to refer to the administration of justice. If so, though in this clause we have independent restrictions on legislative power, these restrictions would only prevent Congress from passing laws which provide arbitrary and unjust rules for the prosecution of civil and criminal causes. The decisions under the Fourteenth Amendment, however, render it impossible to give to the words "due process of law" such a restricted meaning. The Fourteenth Amendment provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This Amendment has not only been held to deprive the states of the power to prescribe arbitrary rules for the conduct of legal proceedings, but to prevent a state passing any law which arbitrarily deprives those affected by it of their property, although the law which has this effect has no relation to judicial proceedings.[9] It is true the words "due process of law" have a different setting in the Fourteenth Amendment than the same words in the Fifth Amendment. In the Fourteenth we have no special reference to the administration of justice, while all the rest of that part of the

[8] A collection of state constitutions having a similar provision, and a fair collection of cases decided prior to and since the decision in Murray's Lessee *v.* Hoboken Land Improvement Co., 18 How. (U. S.) 272, in which it is assumed, either by state or federal judges, that the requirement of "due process of law" is not only a prohibition on legislative power, but contains, in itself, special limitations not found in other parts of the Constitution, will be found in the notes to Cooley, Const. Lim., 7 ed., 500 *et seq.*

[9] See cases collected by Judge Cooley, *supra*, note 8.

Fifth Amendment in which the words "due process of law" appear, relates entirely to this subject. Therefore, though it has been often held that the requirement of the Fourteenth Amendment in respect to "due process" prevents a state legislature from arbitrarily depriving persons of their property in any way, on account of the peculiar setting of the same words in the Fifth Amendment, it is possible to regard Congress as being only restrained from making arbitrary enactments in relation to the trial of criminal causes and other legal proceedings.

But although in the absence of a positive decision a fair argument can be advanced in favor of confining the prohibition of the Fifth Amendment to laws relating to legal proceedings, for the purpose of determining whether an act prohibiting a common carrier from carrying its own products violates the requirement of the Fifth Amendment in respect to "due process of law," it is much safer to start with the assumption that the Supreme Court will hold that Congress is restrained by this provision of the Fifth Amendment from passing any law which arbitrarily deprives a person of property, even though the law has nothing to do with legal administration. On the other hand, we may fairly conclude that the prohibition against deprivation of property without due process in the Fifth Amendment, while it may be less sweeping, is certainly not any more sweeping than the same provision in the Fourteenth Amendment; and that, therefore, if the Supreme Court has held a state law affecting private property to be constitutional in spite of the Fourteenth Amendment, they will hold a similar law passed by Congress to be within the requirements of this part of the Fifth Amendment.

As pointed out, the Commodity Clause, looked at from the point of view of the carrier as an owner of property devoted to its business as carrier — the railroad property of the railroad company, for instance — does not take from such carrier its property either directly or indirectly. It does, however, affect the possible uses to which the railroad company can put its railroad property. How far do the decisions under the Fourteenth Amendment — there are none on the point under the Fifth Amendment — discuss the question whether an interference with the use of property is a deprivation of property, and what bearing have these cases, if any, on the problem raised by the particular clause of the Hepburn Act under discussion? Perhaps the simplest way of answering these questions is to state, as succinctly as possible, the different classes of ways in

which legislation may directly affect the use of property without taking it, and show how far state legislation falling under each class has been held constitutional or unconstitutional.

First: Legislation may make more difficult any use to which certain property is put without making illegal any particular use. An example of legislation falling under this class would be an act which provided for a change of grade in the street in front of private property, or which partly closed such street by directing the erection of an elevated railroad or other structure. The Supreme Court has just held that this class of interruptions to use can never deprive the owner of the property adversely affected without due process of law; that an act of the state affecting the ingress and egress to property, for instance, is not a violation of the Fourteenth Amendment unless the local law of the state vests in the owner an easement in the street, which easement has been taken by the act without compensation.[10]

Second: Legislation may prohibit a particular use, which use, prior to the legislative enactment, was lawful; as acts prohibiting the keeping of pigs inside city limits or the manufacture of liquors in distilleries located in the state. In cases involving this class of legislation the Supreme Court has held that the legislature, acting under the police power, may pass such legislation without violating the Fourteenth Amendment, even though the act practically destroys the value of the property affected and fails to provide any compensation to the injured owner. Thus a law which renders useless the distilleries or breweries of the state by prohibiting their use as breweries and distilleries is constitutional, and the state is not required by the Fourteenth Amendment to provide compensation.[11] It is not certain, because the question has never arisen, whether an act which prohibited a particular use of property, which act the court would regard as outside the police power, could be passed by a state without compensating the owners of the particular class of property affected; indeed, it is not certain whether such an act could be passed at all.

Third: Legislation may prohibit the sale of certain property altogether, or the sale of particular property to a certain class or

[10] Sauer *v.* New York, 206 U. S. 536 (1907).

[11] Mugler *v.* Kansas, 123 U. S. 623 (1887). See also a law prohibiting a fertilizing plant to be used in the only manner in which it was practical to use such plant, which has been upheld, Fertilizing Co. *v.* Hyde Park, 97 U. S. 27 (1878); also an ordinance depriving a person of the right to use his property as a laundry between the hours of ten in the evening and six in the morning. Barbier *v.* Connolly, 113 U. S. 27 (1885).

classes of persons. Here, again, acts falling under this class, passed under the police power, though they destroy the value of the property and provide no compensation to the owner, have been upheld by the Supreme Court in spite of the objection that they violated the provisions of the Fourteenth Amendment. A law prohibiting the sale of intoxicating liquor as applied to liquor already in existence within the jurisdiction of the state at the time of the passage of the act is a good example of legislation falling under this class which has been sustained by the court.[12] Whether a state, outside of the police power, has the right, with or without compensation, to pass a law prohibiting the sale of commodities, is a question which the Supreme Court has not been called upon to decide.

Fourth: Legislation may regulate the price at which certain property shall be sold, or the price of some service in connection with a particular use of property. No state legislature has attempted to regulate the price of ordinary services, or the price at which commodities generally shall be sold. We do not know, therefore, if an act which attempted to fix the price of such an article as oil, entirely apart from the reasonableness of the price fixed, would or would not be "due process."[13] All the state legislation falling under this head has been designed to regulate the charges of public service corporations. Here the Supreme Court has held that a state has the power to regulate the rate of charge, but that the rate fixed by the legislature must be reasonable.[14] If the rate fixed does not permit a fair return on the property, which the common carrier or other public service corporation has embarked in its business, then the act deprives the company of its property without "due process of law."[15]

Certain things stand out clearly from the foregoing analysis of the decisions under the Fourteenth Amendment. In the first place it is interesting to note that it is not as yet certain that any law which attempts to deprive a person of a right to use his prop-

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[12] Mugler *v.* Kansas, 123 U. S. 623 (1887).

[13] Munn *v.* Illinois, 94 U. S. 113 (1876); C., B. & Q. R. R. Co. *v.* Iowa, *ibid.* 155; Peik *v.* Chicago & Northwestern R. R. Co., *ibid.* 164; Chicago, Milwaukee & St. P. R. R. Co. *v.* Minnesota, 134 U. S. 418 (1889); and Budd *v.* New York, 143 U. S. 517 (1891), seem to assume that the price of an article not affected by a public interest cannot be regulated by law. The point, however, has never been decided. For articles bearing on the subject, see 32 Am. L. Reg. (N. S.) (now U. P. L. Rev.) 1 and 9; 13 Yale L. J. 56.

[14] See cases cited *supra*, n. 13.

[15] Chicago, Milwaukee & St. P. R. R. Co. *v.* Minnesota, 134 U. S. 418 (1889).

erty, or even of a right to sell his property, would be regarded as a deprivation of property without due process of law. Under what we may call the railroad rate cases all that has been decided is that, if a public service corporation is obliged to perform a public service, the legislature must not, on the one hand, compel the performance of the services, and, on the other, deprive the company of a right to receive a reasonable return for them. In the second place, the power of a state to fix reasonable rates of charge for the services of a common carrier has never been doubted. Lastly, it is certain that a law which deprives a person of the use of property without taking the property, if passed under the police power, is not obnoxious to the requirement that no person shall be deprived of his property without due process.

Back of these conclusions lie apparently two ideas. One is that every state has a police power. The other idea is that every state has a special power to regulate common carriers subject to its jurisdiction. Regulations which might be obnoxious to the requirement that private property shall not be taken without due process of law when applied to ordinary occupations, are not obnoxious to that requirement when applied to a business affected with a public interest. It would seem, however, that the regulation of a common carrier, while in a sense it may be regarded as an exercise of a special power, is not an exercise of the police power, at least when the question of the constitutionality of the act in view of the requirement of due process of law is considered by the court. For instance, a regulation of rates which is not reasonable is not due process of law, though a police regulation which does not provide compensation for the injury done to the property affected, is due process of law. As the requirement of due process of law seems to be useless as a check on the police power, but operates as a check on all other laws, it is important to our present inquiry to determine whether the Commodity Clause of the Hepburn Act is an exercise on the part of Congress of a police power over interstate commerce. If it can be regarded as the exercise of the police power, then the clause requiring "due process of law" has no application. If, on the other hand, it is merely an exercise of a power of regulation like an act fixing the rates of fare, then the regulation, like a regulation of rates, must be reasonable.

In this place it may be asked: Does the power to regulate interstate commerce include a power of police over such commerce?

In answer to this question it can be said that there is no apparent reason why Congress, being the only power which can regulate interstate commerce, does not possess over that commerce all the powers of government, including the police power. The Lottery Case would appear to be a positive decision on this point.[16] Congress prohibited persons in one state sending lottery tickets into another state. The majority of the court held this act to be constitutional. They refused to say that there exists a general power in Congress to prohibit interstate commerce in recognized articles of commerce; but they did decide that Congress could stop interstate traffic in such an article as a lottery ticket.[17] What is this but affirming that Congress, provided the law acts only on interstate commerce, can legislate for the improvement of the morals of the people of the United States, and that acts for the improvement of morals may be due process of law, where similar acts for purposes beyond the scope of the police power would not be due process?

At the same time, though Congress may possess over interstate commerce the power of police, it does not follow that the Commodity Clause is an exercise of that power. It has been held that a law designed to protect the morals, the health, or the safety of the people is a police law. But our courts, including the Supreme Court of the United States, have very generally declined to define the limits of the power. The Supreme Court has never held that the "welfare" of the people as well as their health, morals, and safety, is within the police power. And therefore, though we may argue in favor of the proposition, we cannot positively assert that an act designed to make a common carrier live up to its public duties as a common carrier, which act has no relation to the morals, or health, or safety of the people, is a law passed in the exercise of a police power. It is, therefore, safer to conclude, though we may recognize that the conclusion is doubtful, that the Commodity Clause of the Hepburn Act was not passed in the exercise of a power of police. Not being passed as a police regulation, it follows that to prevent it from being obnoxious to the requirement of "due process," it must be reasonable. Again, the test of reasonableness as applied to this Act must be the same as that which is applied to rate regulation. The Act must not prevent the carrier from receiving a fair return from the property which it has embarked in its business as a common carrier.

Let us now turn to the facts. Admitting that the Act, if it de-

[16] 188 U. S. 321 (1902).

[17] See *supra*, n. 6.

prives any railroad company of its ability to receive a fair return on the property which it has invested in its business as a common carrier, deprives that company of its property without due process of law, by what possibility can the Act have such an effect? A regulation which prohibits a railroad from transporting its own goods, acquired or to be hereafter acquired, does not deprive the railroad of its ability to make full use and receive a reasonable return on all property which it has invested in its business as a common carrier. If the railroad did not own the goods at the time of the passage of the Act, it was not obliged to purchase them. If, on the other hand, it did own them, it may sell them again without affecting its ability to receive a full return on its railroad property. Under any view, therefore, or any circumstances which may arise, the common carrier as the owner of the property devoted to its business as common carrier is not, by the Commodity Clause, deprived of this property without "due process of law," contrary to the Fifth Amendment to the Constitution.

Down to this point we have regarded the common carrier affected by the Act under discussion as the owner of a railroad. Let us now look at the common carrier as an owner of property which it desires to carry to another state contrary to the provisions of the statute. There are two possible classes of cases: one where the property — such as coal — was owned by the carrier prior to the passage of the Act; the other, where the property has been acquired after the passage of the Act. We may ask, first: Does the Act, contrary to the last clause of the Fifth Amendment, in either case take the property of the common carrier which it has devoted to production, or desires so to devote? Unquestionably not. There is in neither case any physical taking, and while the Supreme Court has held that an act which amounts to a physical taking, as the overflowing of land with water, may be a taking within such a provision as that contained in the last clause of the Fifth Amendment, it has never been intimated that placing a person in a position where it is economically desirable, or even necessary, that he should dispose of certain property, is a taking of that property.

A word may be said here in regard to that class of property known as a franchise. As practically all our common carriers are corporations, it may be that some have expressly inserted in their charters the right to mine such a product as coal, and to transport it to market after it is mined. Such a right, however, is a right conferred by the state creating the corporation. It can extend no

further — even if it can extend as far — than to confer on the corporation any right which a natural person might possess of carrying on at one time the business of a common carrier and the business of a producer. Whether the state having conferred on a corporation the right to be a common carrier, and also the right to be a producer, can thereafter expressly or practically prohibit the corporation from engaging in the producing business, in view of the constitutional provision that no state shall impair the obligation of contracts, need not be discussed. It is evident that the state has no right to confer on a corporation of its own creation a right to engage in the business of an interstate carrier except subject to those rules which the federal government may lawfully make to regulate all natural persons being interstate common carriers. As affecting, therefore, the property of the carrier which is devoted to its producing business, or as affecting any franchises conferred on the carrier by the state of its creation, the Act does not, in any possible view, take such tangible property or such franchises.

Let us now turn to the clause requiring due process of law. The property devoted to production may be coal lands. These lands may have been possessed by the carrier at the time of the passage of the Act, or they may have been purchased since. As applied to the second case, the Commodity Clause is evidently not obnoxious to the requirement of due process. The requirement of due process, as we have seen, does not prevent the regulation of a common carrier. At least it has been decided that it does not prevent those regulations which are fairly designed, as in this case, to prevent a condition tending to interfere with the performance by the carrier of its public duties. Where the carrier has acquired property subsequent to the passage of the Act, the property has been acquired with the knowledge that Congress intended, after May first of this year, to make it unlawful for the carrier to transport the property to market. Having acquired the property subject to the incident of non-transportability, it cannot complain that it is deprived of a right of property if Congress refuses to suspend this incident.

On the other hand, the case at least presents other features if the property which the law prohibits the carrier from transporting was acquired at the time when it was perfectly lawful to transport it. Take, for instance, a railroad company owning coal lands in June, 1906. If such a company goes out of business as a common carrier, unless it secures the sanction of the state legislature to a lease

of its franchises, it forfeits its charter. On the other hand, the coal in its mines is useless unless transported to market, and it may well be that the only road by which the coal can be transported is its own road. In such a case the Act practically forces the railway company to sell or otherwise dispose of its coal lands. In the present state of our constitutional law in regard to deprivation of use of property and the requirement that no one shall be deprived of his property without due process of law, it would be a bold prophet who would assert that any act which practically rendered property useless, or required its sale at ruinous prices, would be constitutional or unconstitutional, where the act was passed, not in the exercise of a police power, but merely in the exercise of the power to regulate common carriers. The Act which we are discussing, however, did not go suddenly into effect. While after May first it prevents the transportation of coal mined by the carrier transporting it, it gave ample time to all carriers to transport to market all the coal which they had already mined at the time of the passage of the Act. While it doubtless does practically require many railroads interested directly or indirectly in coal lands to sell or otherwise dispose of such lands, it did not require this to be done suddenly. On the contrary, it allowed the railroads nearly two years to dispose of their coal properties in one way or another. And the fact that our common carriers are corporations in one respect renders it less likely that the time allowance is unreasonably short. If the common carrier, being also a producer, was a single individual, there would be nothing left for him to do but sell the property devoted to the business of production if he desired to continue his business as a common carrier. But our common carriers being corporations having stockholders, an actual sale of the property employed in the producing business is not necessary. All that is necessary is to distribute to the stockholders *pro rata* the shares of a new company formed to take over the mining or manufacturing business of the corporation. On the other hand, it must be remembered that in the case of many corporations the very magnitude of the property to be disposed of and the number and variety of the interests to be consulted, if they do not necessarily increase the legal difficulties, do increase the practical difficulties connected with a profitable disposition of that property which the Act, when its time limit expires, may render practically useless in the hands of the carrier. As applied to some companies, therefore, the Act, even in view of the time allowance, may be considered

unreasonable. But the burden would appear to be on each carrier to prove that as applied to it the Act is unreasonable. On its face the Act is not an arbitrary act.

There is, however, one case, which it is at least possible to imagine, where the carrier is not merely in a position in which it finds it difficult to dispose of its coal or other producing properties, but where it is legally impossible for it to do so. Our entire interstate railways are operated by companies deriving their charters from the states. As a result the relation of the stockholders *inter se* and the relation of the companies to their creditors, are determined by state, not federal, law. It is entirely possible that a railroad company owns property, practically useless after May first of this year, which property it cannot dispose of, because any disposition would be contrary to the law of the state of its incorporation. Suppose, for instance, a railroad company owning coal land prior to the passage of the Act placed a blanket mortgage on its property — railroad property and coal property — to secure its bonds, and suppose further that one of the clauses of the mortgage deprives the company of the power to sell or otherwise part with any of the property covered by the mortgage, and requires the company to operate its coal property in connection with its railroad property. The way in which a case of this general character is usually put is to suppose that a sale of any of the property covered by the mortgage can only be made with the consent of the trustee of the mortgage, and that the trustee has refused this consent. This, however, does not necessarily inflict a hardship on the company. As the company, in view of the Act, cannot use its coal lands, it may fairly be considered to be the duty of the trustee to consent to a disposition of the coal property, and, if he arbitrarily refuses this consent, his refusal may perhaps be overcome by proceedings in chancery. As applied, however, to a case where the trustee of the mortgage has no power to give consent to a sale of any of the property covered by the mortgage, does the Commodity Clause deprive the railroad of its coal property without due process of law? The hardship on the company is manifest. And it will be noted that the state, without the permission of the bondholders, cannot relieve the company by conferring on it a power to dispose of the coal lands contrary to the terms of the mortgage. A state statute attempting to do this would impair the contract between the bondholders and the company, and would therefore be contrary to the Constitution of the United States. Under the supposed facts, when the mortgage was made, the non-action of Con-

gress made the stipulation in regard to the combined operation of the coal lands and the railroad, and the clause in regard to the non-disposition of the coal lands, a sound business arrangement. On the other hand, the power of Congress over interstate commerce carriers existed at the time of the execution of the contract, and all the business arrangements of the carrier were made with full knowledge of that power. To ask Congress to take the coal lands by eminent domain and pay for them would be impossible. Congress, if it exercises the right of eminent domain, must do so for some constitutional purpose. It has no power to acquire property by eminent domain merely for the purpose of re-selling it. Again, to ask Congress to pay for the damage done would be absurd. By what rule could the damage be measured? Under the facts supposed there is damage only so long as the bondholders insist on the clause in their contract with the company which prohibits the company from disposing of its property. Therefore we may put the constitutional question raised by the supposed case thus: Does the clause prohibiting Congress from passing any law depriving a person of property without due process of law enable a common carrier, which by contract has deprived itself of the ordinary power of control over its property, to use this contract as a club to prevent Congress applying to it a law regulating interstate common carriers? As thus put, the question would appear to be capable of only one answer, even though it may be admitted that the power we are talking about — the power to regulate common carriers — is not so essential a power as the police power. Are the powers of government to govern capable of being frittered away by the private contracts of individuals? The words "due process of law" have never been held to have any such result. The government of the United States, unlike the government of the states, can impair private contracts. But even if this were not so, the Commodity Clause, as applied to the extreme case supposed, does not impair the obligation of the contract between the bondholders and the company. The supposition that the Act as applied to the case might deprive the company of its coal lands without due process of law is based on the assumption that the Act has no effect on the stipulations contained in the mortgage. Those who by contract deprive themselves of control of their property do so knowing that changing conditions may make them anxious to exercise those powers which they surrender. Does a government make an implied promise never to act merely because it has not acted? One of the conditions which every common carrier knows may change

is the statute law regulating the exercise of its public functions. It is fundamental that the plea of laches is not good against the public. Even if it were, it might be questioned whether the mere non-exercise of a power of government could ever amount to laches.

All this from a legal and constitutional point of view may be fairly considered to be beyond reasonable doubt. Yet it may not be improper in this place to point out that the case supposed, though unlikely to occur, is not impossible; and that if it does occur it is a case in which the resulting hardship on the carrier would be very real. Of course, this hardship may be exaggerated. The bondholders in the case supposed, seeing the inability of the railroad to profitably utilize its coal land, would naturally finally consent to a sale. But while arrangements are going forward the real loss to the carrier would be considerable. The hardship occurs because the carrier is subject to two jurisdictions, one federal, the other state. If our interstate carriers were incorporated under federal law, these unexpected hardships would be far less likely to occur. The mere possibility of the case which we have supposed would seem to indicate that, under the peculiarities of our federal system, the only way to avoid unexpected but very real injustice to our interstate common carriers, now that the people of the United States have apparently determined to place such carriers under strict federal control, is to provide for the federal incorporation of all companies doing an interstate transportation business.[18]

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[18] Perhaps our subject should not be dismissed without a word in regard to that part of the Commodity Clause which excepts from its prohibition "timber and the manufactured products thereof." Is there any possibility that this exception makes the Act class legislation, admitting that under the requirement of the Fifth Amendment the words "due process of law" prohibit Congress from enacting class legislation? When an act is attacked as unconstitutional on the ground that it is class legislation, the test of constitutionality is the reasonableness of the classification found in the act. The Commodity Clause affects all common carriers by rail. That regulation of interstate commerce confined to common carriers by rail is not class legislation, may be admitted without comment. Again, the Act applies, not to one commodity excepting all others, but to all commodities excepting timber and its manufactured products. One reason for the exception may be suggested. To encourage the building of railroads, the national government has granted to railroads in the past large tracts of land. To preserve to these railroads the right to transport to market the chief product of these lands would appear to be within the constitutional power of Congress. Such an exception as that embodied in the Act may therefore represent a natural sense of consistency and fairness. As the exception, therefore, is based on a rational ground, which is apart from any desire to favor one class, the act would appear to be free from the taint of class legislation.